

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JASON BROWN,

Petitioner, No. CIV S-05-0866 FCD EFB P

vs.

DIANA K. BUTLER,

Respondent. ORDER

16 _____ / Petitioner is a state prisoner without counsel seeking a writ of habeas corpus. *See* 28

17 U.S.C. § 2254. On September 29, 2006, petitioner moved for an evidentiary hearing on the
18 merits of his petition. On October 4, 2006, respondent moved to dismiss on the ground that the
19 petition contains some unexhausted claims. Petitioner opposed that motion, and on July 10,
20 2007, the court found that the petition contains both exhausted and unexhausted claims, and gave
21 petitioner 30 days to request that the court stay this action and hold it in abeyance while he
22 presents his unexhausted claims to the state courts. Petitioner requested an extension of time to
23 comply with that order and on August 22, 2007, the court gave petitioner an additional 20 days.
24 For the reasons explained below, the court finds that petitioner's motion for an evidentiary
25 hearing must be denied without prejudice.

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1 A habeas petitioner is entitled to an evidentiary hearing if he has alleged facts which, if
2 proven, would entitle him to relief and he did not receive a full and fair opportunity to develop
3 those facts. *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005); *Ortiz v. Stewart*, 149 F.3d
4 923, 934 (9th Cir. 1998) (petitioner must allege specific facts in order to obtain an evidentiary
5 hearing). Thus, whether the court should hold an evidentiary hearing is a fact-based inquiry.
6 Here, respondent has not answered the petition. Instead, the court has determined that petitioner
7 cannot proceed on the present application because it contains both exhausted and unexhausted
8 claims. At this stage in the proceedings, it is impossible to determine whether an evidentiary
9 hearing is warranted. Thus, petitioner's motion must be denied as premature.

10 Accordingly, it is ORDERED that petitioner's September 29, 2006, motion for an
11 evidentiary hearing is denied without prejudice.

12 Dated: September 13, 2007.

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14 EDMUND F. BRENNAN
15 UNITED STATES MAGISTRATE JUDGE
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